IN THE CIRCUIT COURT OF WASHINGTON COUNTY.

COMMONWEALTH *v.* WILEY RICHARDS.

Criminal Law—Gaming—Public Place—What Constitutes.—The playing of cards during business hours at a place which is ordinarily public, but from which the public is excluded by the shutting of the blinds, pulling down of the curtains and the closing of the doors, is not gaming in a "public place" within the meaning of the Virginia statute.

Same—Same—Same—Same.—A place may be public when the playing thereat is within the view of persons assembled, or who might assemble at another place to which the public have access, but the former place will not become public under this principle unless the playing is within the view of persons who may assemble at such latter place.

Same—Same—Same—Private Room.—The assemblage of persons by invitation at a private house or room will not constitute such house or room a public place, uninvited persons not being permitted to resort there.

Same—Same—Same—Insurance Office.—Playing cards during business hours in an insurance office, if at the time of the playing the doors were locked, the curtains were down, and the public excluded, no one being present except those in the game, is not gaming in a "public place" within the meaning of the Virginia statute.

F. B. HUTTON, Judge. In this case I have delayed rendering a decision in order that I might have an opportunity to consult certain decisions cited in text-books, reports of which are not to be found in Abingdon, but thus far I have been unable to get them, and think I ought not to delay my decision longer.

I instructed the Grand Jury that a store-house during business hours was *prima facie* a public place, and after business hours, and the store had been closed in good faith for the day, it was *prima facie* not a public place; that it might become a public place after business hours, and it might become a private place during business hours, under certain circumstances. The question is, whether the instruction to the Grand Jury correctly stated the law.

Richards was indicted for playing cards at a public place, and it was shown by the evidence that he played cards during business hours in the insurance office of F. B. Brownlow, but at the time of the playing the doors were locked, the curtains were down, the public were excluded, and that there was no one present except those in the game and the witness who had gone there to play.

It is very difficult to define what is a public place. It is easier

to state what is not a public place than what is a public place. The term "public place" as used in the statute, as a general rule, includes any place which for the time being is made public by the assemblage of people, and is not limited merely to places devoted solely to the uses of the public; and so there may be two classes of public places,—one public in itself, and the other made so by the assemblage of people who go there without invitation and without restraint. A. & E. Enc. of Law, vol. 14, p. 678.

In Parker *v.* The State, 26 Texas 204, it was held that "the term 'public place' does not mean a place devoted solely to the use of the public, but a place which is in point of fact public as distinguished from private,—a place visited by many persons and usually accessible to the neighboring public."

In the case of Coleman *v.* The State, 20 Alabama 51, it was held that "if the occupant of a room is in the constant habit of inviting a number of persons to assemble there, and others are allowed to go without being invited and without restraint, the room may thereby become a public place."

The same principle was held in the case of Bishop *v.* The Commonwealth, 13 Gratt. 785.

To render a place a public place, it is not necessary that the general public shall have the right of access thereto,—it is sufficient, if persons are permitted to go there without invitation and without restraint, and under such circumstances a private residence may become a public place. A. & E. Ency of Law, vol. 14, 679.

In Smith *v.* The State, 52 Alabama 384, it was held that "any house to which all who may wish, can go, night or day, and engage in gaming in its various forms is a public place within the meaning of the Alabama statute. The facts that its proprietor uses it as a bedroom as well as a gaming room, and that entrance can be gained only by knocking at the door when it is opened from the inside, do not relieve it from the character of a public place."

The assemblage of persons by invitation at a private house or room will not constitute such house or room a public place, uninvited persons not being permitted to resort there.

Places of business to which the public are impliedly invited for the transaction of business are, during the business hours, deemed public places, but after the business hours and after such places are closed to the public, in the absence of other proof they will be regarded as private places. Purcell *v.* The Commonwealth, 14 Gratt. 679; Commonwealth *v.* Feazle, 8 Gratt. 585. In the last case it was held that "a store-house in a village is no longer a public place at night after persons cease to come to the store to purchase goods and the door is locked."

Again, a place may be public when the playing thereat is within the view of persons assembled, or who might assemble at another place to which the public have access, but of course the former place will not become public under this principle unless the playing is within the view of persons who may assemble at such latter place. Amer. & Eng. Ency of Law, vol. 14, p. 680. To the same effect are definitions of a public place as given by Mr. Bishop, Mr. Minor and Mr. Davis in their works on criminal law.

I have not been able to find in Virginia any direct decision of the question confronting me, viz: whether a place which is ordinarily public can become a private place by temporarily closing said place for the purpose of playing cards, the public being excluded by the shutting down of the blinds, pulling down of the curtains and the closing of the doors. The only direct authority I have been able to find is found in Section 2209 of Hughes Criminal Law. Mr. Hughes says: "Closing an office or public place temporarily during business hours for the purpose of gaming with cards therein will not cause it to become a private office; it will not by such act cease to be a public place for the transaction of business," citing as authority for that proposition, a Texas case.

In Skinner *v.* The State, 30 Alabama 524, a dry goods store was held to be a public house, though the gaming therein was by night, after the windows and doors were closed and no other persons than the players were present. If the statement made by Mr. Hughes and as decided in the case of Skinner *v.* The State, *supra,* is a correct interpretation of the law, then a party cannot close a public office temporarily for the purpose of gaming, and thereby render it private; but is that a proper construction of the Virginia statute, in view of the decisions of the Court of Appeals of our state?

The principle announced in Skinner *v.* The State, *supra,* is in direct conflict (assuming the facts in each case to be the same) with the Virginia and West Virginia rule, it having been held in Virginia and West Virginia that a store-house closed in good faith was *prima facie* not a public place after business hours.

I am inclined, from a most careful investigation of all the Virginia decisions, to the opinion that the playing of cards during business hours, with the doors shut and the curtains down, does not render the place a public place within the meaning of the statute. If the place is specifically mentioned in the statute, like ordinary, and race field, it is immaterial that the game was in fact behind closed doors, or was not otherwise public in fact, but the place where the play takes place, not thus designated by statute, must be proved to be in fact public at the time of the play.

The object of the statute as given in the Code of 1803, is "to prevent gaming at ordinaries and other public places, which must be attended with quarrels, disputes and controversies, the improverishment of many people and their families, and the ruin of the health and corruption of the manners of youth, who upon such occasions frequently fall in company with lewd, idle and dissolute persons who have no other way of maintaining themselves but by gaming," that is, to avoid, for the reasons stated, the ill example to others. It seems to me that the object and purpose of that section was not to suppress gaming as a vice, per se, but to prevent it from becoming a nuisance to the public or from being enticing to those not already addicted to the vice; to keep it from the public eye for the good of the public, or for the protection of the public, for the good of those who might be allured by it, from observing the game, and for the protection of those, who would be annoyed by it. The place must in fact be public at the time of the game. It was not specially for the reformation of the gambler. Such being the object of the statute, to bring a party within its prohibitions he must play at a public place. If a store-house is not a public place after business hours, with doors closed and curtains down, as has been held in Virginia, so the same store-house would not be a public place at any other time during the day, under the same circumstances. In neither case would the public example be set which the law is trying to avoid. The same would be true of an insurance office. The place must be one to which the people are at the time privileged to resort at will, without invitation, as defined by Mr. Davis in his work on Criminal Law and in Bishop on Statutory Crimes. An office, whether of a lawyer, insurance agent or other person, which is locked for the purpose of excluding the public, and the blinds of which are closed for the purpose of excluding the inmates from view of outsiders, can hardly be said to be a public place to which the people can resort without invitation. An office is public so long as the owner or occupant chooses to make it so. He may at any time close it temporarily or permanently, and when he does cut off the privilege of the public to resort to it, it becomes his private office or property, and the public have no right to resort to it. A place to which the public have no right to resort, and in fact do not resort and cannot resort, is not, in my opinion, a public place. The question, I repeat, as it seems to me is (aside from places specially declared public in the statute) not whether the place is usually accessible to the public, but whether it was accessible to the public at the time the game was played.

An insurance office is not one of the statutory places where playing is forbidden, except where it is in fact a public place,

and just so soon as it ceases to be a public place, it ceases to be within the statute.

The foregoing views I think are sustained by Windsor's Case, 4 Leigh 680, Feazel's Case, 8 Gratt. 585, Vandine's Case, 6 Gratt. 689, Bishop's Case, 13 Gratt. 785, and State *v.* Brast, 31 W. Va. 380, 7 S. E. Rep. 11.

In State *v.* Brast, *supra,* Snyder, J., in a very able opinion construing the West Virginia statute lmost identical with the Virginia statute, says: "According to the statute, gaming at an hotel or tavern is an offense without evidence or proof that it is a public place. All that is necessary, in such case, is to prove that the gaming was done at an hotel or tavern, and the offense is established, but it is very different in the case of an indictment for gaming at a public place. In such case it devolves upon the prosecution to prove, not only the place, but that it was a public place. Unless the gaming is done at an hotel or tavern, or at a public place, the act does not constitute an offense under the provision of the statute and unless it is proved that the gaming here charged was done at a public place, then, under this indictment, the defendant is not shown to be guilty of the offense charged and cannot be convicted." Then, after reviewing all the Virginia decisions on the subject up to that time, he says: "The general principle to be deduced from these cases seems to be that the place at which the gaming occurs must be public at the time the playing takes place. It must be a place to which the people are at the time privileged to resort without an invitation. There must also be a publicity about it, for this statute is not intended to reach concealed gaming in a private place. There are other provisions of the statute made for the punishment of such cases. This provision is not intended to suppress gaming as a vice, per se, but to prevent it from becoming an annoyance or a nuisance to the public or persons not participating in it."

In Windsor's Case, *supra,* our Court of Appeals held, "to convict the defendant, it was incumbent on the Commonwealth to prove that the play occurred at the store of Huddleston & Co., and that it was a public place at the time of the playing. It was so alleged in the indictment. Proof that Huddleston & Co.'s house was a store-house at which goods were vended would establish that it was a public place, so long as it was kept open for that purpose. But when the business of the day was ended, the store-house was bona fide shut up, the doors closed, it ceased *prima facie* to be a public place, and in the absence of other proof, it would not be regarded as a public place, but as a private one."

Identically the same view was held in Feazel's Case, *supra,* and the same principle is announced in Bishop's Case and Van-

dine's Case, *supra*. I therefore am of opinion that Brownlow had the right to fix his own business hours with the public, and could close his office at will and exclude the public, and play cards without violating the statute; but there must be a closing, and a closing in good faith.

I therefore see no reason for changing the view expressed by me to the Grand Jury, but as the Grand Jury made several indictments, notwithstanding the instructions given them, I felt it my duty to review the whole matter, and I have come to the same conclusion as to the law I did before.

I also took the liberty to write to Judge S. B. Witt, of Richmond, and to Professors Burks and Lile, without expressing to them the view as given by me to the Grand Jury, and citing them to the section in Hughes Criminal Law, *supra*. Each of them sustained the view as given by me in my instruction to the Grand Jury.

Applying the foregoing principles to the facts in this case, I am of opinion that the prisoner should be acquitted, under the evidence adduced before me at the trial.

I do not wish to be understood, however, as saying that the evidence in another case might not show that the office, at the time the playing took place, was in fact a public place, for the question whether a place is a public place or not, when not specially named in the statute, is a question of fact, or a mixed question of law and fact, and should be submitted to the jury under proper instructions.

SUPREME COURT OF APPEALS OF VIRGINIA.

CITY OF DANVILLE *v.* THORNTON.

Jan. 13, 1910.

[66 S. E. 839.]

1. **Municipal Corporations (§ 857*)—Torts—Injuries by Electric Wires—Declaration—Lawful Presence of Plaintiff.**—The declaration, in an action against a city, alleging that defendant permitted an electric company to erect its poles on defendant's streets, which poles were required by an ordinance of defendant to be kept painted, and that plaintiff, who went to the top of one of such poles, pursuant to the ordinance and requirement of defendant, to paint the pole, was injured by coming in contact with an insufficiently insulated charged

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.